Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

vs.

M.V. DSR ATLANTIC, her engines, tackle, machinery, etc., in rem; CHO YANG SHIPPING COMPANY, LTD. a corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a foreign law and jurisdiction clause in a standard form ocean bill of lading relieve the carrying ship of all liability for damage to cargo by selecting a jurisdiction that does not recognize a maritime lien for cargo damage, in light of this Court's decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) and U.S. COGSA § 1303(8)?

RULE 29.6 STATEMENT

Allianz Aktiensgesellschaft Holding (known as Allianz AG), a publicly traded German corporation, is the parent company of petitioner Fireman's Fund Insurance Company. Fireman's Fund Insurance Company does not have any nonwholly owned subsidiaries.

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Petitioner Fireman's Fund Insurance Company respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended, is reported at *Fireman's Fund Ins. Co. v. M.V. DSR Atlantic*, 131 F.3d 1336 (9th Cir. 1998) (App. A). The opinion of the district court is reported at 1996 A.M.C. 878 (N.D. Cal. 1995) (App. D) and can also be found at 1995 WL 871840.

STATEMENT OF JURISDICTION

The court of appeals entered its initial judgment on December 30, 1997 and entered its amended judgment on March 10, 1998. The court of appeals denied a timely petition for rehearing on March 12, 1998. (App. E).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1303(8) of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. App. § 1300-1315, (App. F) provides in relevant part:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening

> such liability otherwise than as provided in this chapter, shall be null and void and of no effect. . . .

STATEMENT OF THE CASE

This petition requests review of a question that could affect virtually every claim for loss or damage to all goods imported to or exported from the United States by ocean carrier. This particular case involves a claim for freezing damage to a shipment of over 1100 cases of wine carried on board the M/V DSR ATLANTIC from France to Oakland, California. Fireman's Fund Ins. Co. ("FFIC") insured the cargo and paid its owner for the loss due to freezing which was discovered when the vessel discharged the cargo in Oakland. FFIC filed an admiralty-maritime action in the Northern District of California against the vessel, *in rem*, to enforce its maritime lien for cargo damage and against Cho Yang Shipping Co. Ltd. as the carrier issuing the bill of lading. Rather than have its vessel arrested to obtain security for the lien, its owner, DSR Senator Lines arranged to have the vessel's insurer provide FFIC with a letter of undertaking (ER 70, 71)[1], which is the form of security customarily given and accepted in such matters. The security obligated the insurer to pay any judgment rendered against the ship in the pending action.

The Ninth Circuit agreed with the district court that litigating in Korea would deprive FFIC of its right to recover damages from the ship. Nonetheless, it reversed the district court and ordered the case dismissed "for want of jurisdiction," holding that loss of such right violated neither COGSA § 1303(8) or the public policy of the United States.

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1. References to "ER" are to the page number in Cho Yang's excerpt of record filed with the Ninth Circuit.

A. The Material Facts

The material facts are not in dispute. In November, 1992, Cho Yang, a Korean company, issued its bill of lading (ER 36-37) contracting to carry wine aboard the DSR ATLANTIC from France to Oakland for delivery to the consignee, Chalone, Inc. DSR-Senator Lines owns the DSR ATLANTIC and is not related to Cho Yang. (App. D at 15a). FFIC insured the cargo aboard the ATLANTIC and the cargo suffered freeze damage en route from France to California. FFIC paid Chalone for the damage and filed suit *in rem* against the ship and *in personam* against Cho Yang. (App. A at 5a).

1. Cho Yang's bill of lading contained the following clause:

> The contract evidenced by or contained in this Bill of Lading is governed by the law of Korea and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Seoul and no other courts.

App. A at 5a.

2. All cargo shipments carried by sea to or from the United States are subject to COGSA, 46 U.S.C. App. § 1300 *et seq.* (App. A at 5a).

3. The security provided to FFIC by the ship's insurers to secure FFIC's maritime lien required the insurer to pay only in event of a judgment rendered against the ship. (App. D at 19a).

4. Litigating in Korea would deprive FFIC of its right to proceed against the ship. (App. A at 7a). FFIC would be unable to charge or enforce its claims against the ship in a Korean court. (App. D at 18a).

5. The Korean Commercial Code and not COGSA would apply if the case were litigated in Korea (App. D at 16a, n.4). Korean law would be at least as favorable as COGSA to FFIC in asserting its claims against the carrier in Korea. (App. A at 10a).

B. The Proceedings Below

FFIC filed suit in March, 1995 against both Cho Yang and the DSR ATLANTIC seeking to recover for damage to the shipment of wine (App. D at 15a), invoking the district court's admiralty and maritime jurisdiction within the meaning of FRCP 9(h) under 28 U.S.C. § 1333. (App. D at 15a). Cho Yang answered, admitting the court's admiralty and maritime jurisdiction. DSR Senator Lines filed a claim to the ship as its owner and answered on behalf of the ship. Cho Yang amended its answer in August, 1995 to assert the Korean forum-selection clause as a defense, alleging that the district court lacked subject matter jurisdiction. Thereafter, Cho Yang brought its motion to dismiss based on the clause. The ship joined in Cho Yang's motion. (App. D at 16a).

The district court denied Cho Yang's motion, holding that loss of *in rem* rights against the ship would lessen liability within the meaning of COGSA § 1303(8) because FFIC would be unable to charge or enforce its claims against the ship. It found FFIC's ability to pursue the ship in a United States court to be a valuable one, which would be lost if the case were litigated in Korea. (App. D at 18a). In declining to enforce Cho Yang's forum selection clause, the district court relied on this Court's admonition in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (hereinafter *"Sky Reefer"*), condemning choice-of-forum and choice-of-law clauses that operate in tandem as a prospective waiver of a party's right to pursue statutory remedies or a clause that chose a foreign court that would apply domestic substantive law limiting the carrier's liability to a sum lower than that to which the party would be entitled to under U.S. law. (App. D at 18a).

Cho Yang moved the district court to certify the issue for interlocutory appeal under 28 U.S.C. § 1292(b), which motion was granted. Thereafter, the Ninth Circuit granted Cho Yang's petition for permission to appeal (App. C at 13a), certifying the issue as one of first impression. (App. A at 5a).

The Ninth Circuit filed its initial opinion December 30, 1997 (App. B at 11a). FFIC filed a timely petition for rehearing with a suggestion that the rehearing be *en banc*. The Ninth Circuit thereafter filed an amended opinion on March 10, 1998. (App. A at 1a). On March 12, 1998, it filed its denial of FFIC's petition for rehearing and rejected the suggestion for a rehearing *en banc*. (App. E at 20a). The only difference between the initial and amended opinion is in the caption. The initial opinion eliminated the ship from the caption and substituted DSR-Senator Line as a defendant. (App. B at 11a). The amended opinion restored the ship as a defendant and removed the ship's owner from the caption. (App. A at 1a).

The Ninth Circuit reversed the district court and remanded the case with instructions to dismiss the matter for want of jurisdiction. (App. A at 10a). It agreed that litigating in Korea would deprive FFIC of its right to proceed *in rem* against the ship. (App. A at 8a). It disagreed that loss of such right lessened appellants' liability under COGSA. It relied on this Court's decision in *Sky Reefer* and focused on what it saw as the substantive obligations and procedures guaranteed to a cargo owner by sections 1303 (1)-(3) of COGSA. It reasoned that § 1303(8) only applied to those obligations. It therefore found that the "mere unavailability of in rem proceedings" did not constitute a lessening of the *specific liability* imposed by COGSA. Rather, it presented a question of the means of enforcing that liability. Given that Korean law was at least as favorable to cargo interests as COGSA, and it would not "reduce the carrier's obligations below what COGSA guarantees," the Ninth Circuit

concluded that the district court erred in finding that litigating in Korea would lessen appellants' liability to FFIC in this case. (App. A at 10a). The Ninth Circuit also held that loss of the right to proceed *in rem* was insufficient to invalidate Cho Yang's foreign jurisdiction and law clause on public policy grounds under *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). (App. A at 7a). At no point in its opinion did the Ninth Circuit address the issue of whether the liability of the **ship** would be impermissibly lessened under § 1303(8).

In sum, COGSA § 1303(8) and this Court's decision in *Sky Reefer* are central to resolution of the question. COGSA states in relevant part:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. . . .

Both the district court and the Ninth Circuit relied on *Sky Reefer* in reaching different results. The district court held that enforcing a foreign jurisdiction and law clause to send a litigant with a valid maritime lien for cargo damage under United States law to a foreign forum that did not recognize such a claim violated COGSA § 1303(8). Enforcing the clause would relieve the ship of all liability for loss or damage to cargo. The Ninth Circuit held that since Korean law would not reduce the carrier's obligations below what COGSA guarantees, the mere unavailability of in rem proceedings did not impermissibly lessen appellants' liability under § 1303(8).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision allows an ocean carrier to prevent a maritime lien for cargo loss or damage from attaching to a ship carrying cargo to or from the United States. All the carrier or shipowner need do is insert a clause into the bill of lading that selects a foreign jurisdiction that does not recognize a maritime lien for cargo damage. Allowing a clause in a bill of lading or contract to extinguish a ship's liability for any loss or damage conflicts with decisions of this Court, Circuit Courts and COGSA. At the district court level, conflicting decisions on the issue are already proliferating and the need for guidance from this Court is growing. This case provides a timely opportunity to provide that guidance, since few district court decisions receive appellate review. The issue is important, not only because of the huge volume of ocean cargo transported to and from the United States by foreign shipowners and the confusion the Ninth Circuit's decision creates in pursuing claims for cargo damage, but also because of recent turmoil in Asian financial markets which serves to emphasize the importance of having the ship itself stand as security for cargo loss or damage.

Finally, the Ninth Circuit's decision fundamentally changes the relationship between ship and cargo under COGSA. The decision effectively **exempts the ship from any liability** for loss or damage to cargo in favor of enforcing a foreign jurisdiction and law clause in a bill of lading. That fundamental change was in error and, at a minimum, such a radical alteration of the legal landscape calls for review by this Court.

I.

THE DECISION CONFLICTS WITH SUPREME COURT INTERPRETATION OF COGSA AND CARGO'S MARITIME LIEN RIGHTS.

This Court recognized in *Sky Reefer* the reasons underlying COGSA's enactment:

> The liability imposed on carriers under COGSA § 3 is defined by explicit standards of conduct, and it is designed to correct specific abuses by carriers. In the 19th century it was a prevalent practice for common carriers to insert clauses in bills of lading exempting themselves from liability for damage or loss, . . .

515 U.S. at 534-535.

In the case at bar, Cho Yang inserted a clause in a bill of lading requiring litigation of cargo claims in Korea, a jurisdiction that does not recognize a maritime lien for cargo damage or an action *in rem* to enforce such a lien. By enforcing the clause, the Ninth Circuit allowed the ship to be exempted from all liability. In *Sky Reefer*, this Court did not consider the effect enforcing a foreign jurisdiction clause would have on cargo's maritime lien for loss or damage to cargo. However, in upholding a foreign arbitration clause, this Court made clear that it would not hesitate to strike down a clause which had the effect of relieving or diminishing the obligations imposed by COGSA:

> The central guarantee of § 3(8) is that the terms of a bill of lading may not relieve the carrier of the obligations or diminish the legal duties specified by the Act. The relevant question, therefore, is whether

> the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees. . . .
>
> *Were there no subsequent opportunity for review and were we persuaded that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy.*"

515 U.S. at 539-540 (1995) (cit. om.) (emphasis added).

Here, the Ninth Circuit ordered the case dismissed. There is no subsequent opportunity for a United States court to review whatever a Korean court might do. It is also undisputed that FFIC's maritime lien and *in rem* rights against the ship carrying the cargo have been extinguished by Cho Yang's foreign law and jurisdiction clause in its bill of lading. Those rights against the **ship** are part of the "central guarantee" of § 1303(8). Section 1303(8) of COGSA imposes obligations and duties on both the carrier and the **ship**:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier **or the ship** from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. . . .

(Emphasis added).

Imposing COGSA's obligations on the ship as a separate legal entity was intended. In enacting COGSA, Congress not only recognized the *in rem* liability of the ship[2] but also provided cargo owners with protection against carriers who sought to contractually limit that liability. In the definitions Congress enacted as part of COGSA, "carrier" is defined to include the owner or the charterer who enters into a contract of carriage with a shipper, (§ 1301(a)). **"Ship"** is separately defined to mean ". . . any vessel used for the carriage of goods by sea."(§ 1301(d)). Indeed, the intention to maintain the ship as a separate legal entity from the carrier appears throughout COGSA. In addition to § 1303(8), the distinction appears at § 1303(6): "In any event the **carrier and the ship** shall be discharged from all liability . . ."; at § 1304(1): "Neither **the carrier nor the ship** shall be liable for . . ."; at § 1304(2): "Neither **the carrier nor the ship** shall be responsible for . . ."; at § 1304(5) (twice): "Neither **the carrier nor the ship** shall in any event be or become liable for . . . Neither **the carrier nor the ship** shall be responsible in any event for . . ."; and, at § 1307.

The Ninth Circuit's decision conflicts with decisions of this Court in failing to recognize and enforce cargo's substantive maritime lien for damage to cargo. For well over a century and long before COGSA's enactment, this Court recognized the well-established principle of maritime law that damage to cargo gives rise to a maritime lien against the offending vessel. *See Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117, 121-122 (1933): "It is not questioned here that the union of the ship and

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2. *See* Uniform Ocean Bills of Lading, Hearings on S. 1152 Before the Committee on Merchant Marine and Fisheries, House of Reps., 74th Cong., 2nd Sess. (Jan. 28, 1936) (report of Dept. Of Commerce at 9-11) (stating COGSA does not change existing law under which the ship is liable *in rem*); H.R. Rep. No. 2218, 74th Cong., 2nd Sess., pt. 1 at 7 (1936) (discussing history of Harter Act and how it was enacted to prevent carriers from limiting liability of **vessel** or owner by inserting exculpatory clauses into their bills of lading).

cargo, once established, gives rise to the right of the vessel to a lien on the cargo for the freight money and of the cargo on the vessel for failure to carry safely and deliver rightly." *See also The Keokuk*, 76 U.S. 517, 519 (1869) ("It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master, . . .").

Once the lien attaches, it may only be enforced by an *in rem* action against the vessel. "It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings." *The China*, 74 U.S. 53, 68 (1868). *See* Federal Rule of Civ. Proc. Supp. Rule C(1)(a); *Vandewater v. Mills (The Yankee Blade)*, 60 U.S. 82, 89 (1856). As noted in the *Yankee Blade:*

> The maritime "privilege" or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a "jus in re," without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested *only by a proceeding in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty.

60 U.S. at 89 (1856) (emphasis added).

In conflict with decisions of this Court, the Ninth Circuit categorized FFIC's inability to enforce its maritime lien rights as a procedural matter: "Thus, the mere unavailability of in rem proceedings . . ." (App. A at 10a). However, this Court has held that a maritime lien, enforceable only by an in rem action against the vessel ". . . is a right of property, and not a mere matter of procedure." *The Lottawanna*, 88 U.S. 558, 579 (1874). The recognition of the *in rem* liability of the vessel has been adhered

to not only by this Court, but also the Circuit courts.[3] A "right" with no means of protecting it is illusory.

Finally, the Ninth Circuit's decision is at odds with decisions of this Court because it enforces a bill of lading clause that has the effect of completely exempting a party from liability arising out of the transportation of goods. In *Knott v. Botany Worsted Mills*, 179 U.S. 69 (1900), which was reaffirmed by this Court in *Sky Reefer*, the carrier attempted to enforce a provision in the bill of lading requiring the application of British law. The bill of lading also contained a provision exempting the carrier from liability for damage to goods caused by the carrier's negligence. In holding that these clauses were null and void under the Harter Act[4], the statutory precursor to COGSA, the Court explained:

> This express provision of the act of Congress overrides and nullifies the stipulations of the bill of lading that the carrier shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag.

179 U.S. at 77.

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3. *Dempsey & Associates v. S.S. Sea Star*, 461 F.2d 1009, 1015 (2d Cir. 1972); *Cactus Pipe and Supply Co. v. M.V. Montmartre*, 756 F.2d 1103, 1113 (5th Cir. 1985); *Cavcar Co. v. M.V. Suzdal*, 723 F.2d 1096, 1101 (3rd Cir. 1983); *Industria Nacional Del Papel, CA v. M/V Albert F*, 730 F.2d 622 (11th Cir. 1984); *Albany Ins. Co. v. M/V Istrian Express*, 61 F.3d 709 (9th Cir. 1995).

4. The Harter Act prohibits carriers from inserting clauses into bills of lading or shipping receipts which relieve the ship or owner from

> liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge.

46 U.S.C. § 190.

Even in the absence of statutory authority, this Court has long held that clauses exempting carriers or ships from responsibility for their negligence or that of their servants are void as against public policy. In *The Kensington*, 183 U.S. 263 (1902), the plaintiff brought an *in rem* action against the ship to recover for lost baggage. This Court faced the question of whether or not the ship could be relieved from the consequence of its fault by exceptions contained in a passenger ticket. This Court rejected the attempted exemption and held the clause to be null and void:

> It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary . . .
>
> Testing the exemptions found in the ticket by the rule of public policy, it is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or his servants.

183 U.S. at 268-269.

In this case, the Ninth Circuit has held that a clause in a bill of lading exempts the ship from all liability whatsoever for loss or damage to cargo. It is submitted that loss of a maritime lien and the ability to enforce that lien due to a foreign jurisdiction

and law clause in a bill of lading are exactly what this Court had in mind when it said,

> Were there no subsequent opportunity for review and were we persuaded that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy."

This case involves important issues of statutory construction, property rights and public policy — all having a substantial impact on international commerce. If a foreign jurisdiction and law clause in a bill of lading is to be interpreted to make a sweeping and fundamental change affecting claims for damage to virtually all goods exported from or imported into the United States by ocean vessel, that change deserves careful review by this Court.

II.

THE NINTH CIRCUIT'S INTERPRETATION OF COGSA AND CARGO'S *IN REM* RIGHTS CONFLICTS WITH DECISIONS OF THE FIFTH AND SECOND CIRCUITS.

Both the Fifth and Second Circuits have interpreted § 1303(8) to void contract clauses which attempt to prohibit maritime liens for cargo loss or damage from attaching to the ship. In *Dods Shipping Ltd. of Nassau, N.P. v. Karobi Lumber Co.*, 397 F.2d 570 (5th Cir. 1968), the shipper filed an *in rem* action against the vessel for cargo damage. The ship's owner contended that a maritime lien could not attach to the vessel pursuant to a lien prohibition clause contained in a charter party agreement. The Fifth Circuit held that COGSA applied to the claim and rejected the shipowner's argument that no maritime lien could attach to

the ship: ". . . the lien prohibition clause contained in the charter party is unenforceable by virtue of the express provisions of 46 U.S.C. § 1303(8)." 397 F.2d at 573.

The Second Circuit in *Demsey & Associates v. S.S. Sea Star*, 461 F.2d 1009 (2nd Cir. 1972) considered an *in rem* claim for cargo damage against the vessel and a plethora of cross-claims and defenses by various charterers of the ship. After affirming the district court's finding that COGSA applied to the bills of lading in question, it held:

> Every claim for cargo damage creates a maritime lien against the ship which may be enforced by a libel in rem. (cit. om.) COGSA, Section 1303(8) prohibits a shipowner from contracting out of this liability. The fact that the *Sea Star* was operated under charter . . . does not affect the liability of the vessel.

461 F.2d at 1014.

Indeed, the Second Circuit has condemned any bill of lading clause subject to COGSA that purports to relieve the vessel of liability imposed by COGSA. In *Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 978 F.2d 47 (2nd Cir. 1992), the cargo owner brought an *in rem* action against the vessel for cargo damage. The vessel disclaimed liability by arguing that a clause in its bill of lading exempted it from liability for negligence in stowing and discharging the cargo. In reversing the district court's holding that the vessel was not liable pursuant to the exculpatory clause, the Second Circuit held that the agreement was "null and void" under § 1303(8) because it impermissibly lessened the liability of the ship. 978 F.2d at 50. It went on to state:

> There should be little dispute that the purpose of COGSA is to place primary responsibility for the

> safety of the cargo upon the **vessel**, its operators and owners. The parties cannot by private agreement circumvent the legislative purpose of the Act. 46 U.S.C. app. § 1303(8). The **vessel** may exonerate its responsibility by carrying its burden of proof that the damage did not occur because of its own acts.

978 F.2d at 52 (emphasis added).

Neither the Second or Fifth Circuit has considered the specific issue of whether a foreign jurisdiction and law clause can extinguish cargo's maritime lien for cargo damage without violating § 1303(8) or this Court's admonition in *Sky Reefer*. However, there is no question they have reached a different result on the fundamental issue: A bill of lading clause subject to COGSA which insulates the ship from a maritime lien for cargo damage is null and void. On the other hand, the Ninth Circuit believes that this Court in *Sky Reefer* permits such a result. The result can be achieved indirectly with an otherwise enforceable bill of lading clause that requires cargo claim litigation in a foreign jurisdiction that does not recognize the U.S. maritime lien for cargo loss or damage. Only this Court can resolve the conflict.

III.

THE NINTH CIRCUIT'S DECISION IS ERRONEOUS AND ALREADY CONFLICTS WITH A DISTRICT COURT DECISION.

As set forth above, the Ninth Circuit's decision resulted in the termination of any liability of the ship based on a clause in a bill of lading subject to COGSA. Moreover, it overlooked and misapprehended well-established law and public policy regarding maritime liens.

The Ninth Circuit correctly quoted COGSA in summarizing FFIC's argument that the bill of lading clause violated section 1303(8) which provides in part (App. A at 8a):

> that any clause in a contract of carriage relieving the carrier or the **ship** from liability for loss or damage . . . or lessening such liability . . . shall be null and void and of no effect.

(Emphasis added).

It recognized that " litigating in Korea will deprive FFIC of its right to proceed in rem against The Atlantic . . ." (App. A at 7a). Yet, when discussing its disagreement with the district court regarding the effect of FFIC's loss of *in rem* rights, it omitted any discussion of the **ship's** separate statutory liability under COGSA. Instead, it only discussed whether or not the **carrier's** liability had been lessened. It completely overlooked the specific liability of the **ship** referenced in the statute and, as a result, was wrong when it concluded that "the mere unavailability of in rem proceedings does not constitute a 'lessening of the *specific liability* imposed by COGSA . . .' " (emphasis, the court's) (App at 10a).

As discussed previously, this Court and other circuit courts have held that a maritime lien is a substantive property right, a right specifically recognized by Congress. *See* 46 U.S.C. § 31301(5)(B) (a preferred maritime lien exists "for damage arising out of a maritime tort."). By upholding the Korean jurisdiction and law selection clause in Cho Yang's bill of lading, the Ninth Circuit relegated FFIC to a forum that has no procedure for enforcing its preferred maritime lien against the vessel. It thereby extinguished the maritime lien FFIC had perfected for loss or damage to cargo. The opinion overlooked the character of the lien as a substantive property right and COGSA's specific

designation of the ship, in addition to the carrier, as a separate party whose liability could not be extinguished or lessened by a bill of lading clause. Since COGSA specifically forbids such a result, the court erred when it concluded that "the mere unavailability of in rem proceedings does not constitute a 'lessening of specific liability imposed by COGSA . . .' " (App. A at 10a).

This error has already been pointed out by one district court facing a similar *Sky Reefer* motion to enforce a Korean law and jurisdiction clause. It cited the mistake as a reason for **not** following the decision with respect to loss of cargo's *in rem* maritime lien claim against the vessel:

> [P]laintiff's inability under Korean law to bring an *in rem* action against the vessel, would appear to deprive plaintiff of one of the substantive rights expressly guaranteed by § 3(8). That section forbids "any clause . . . in a contract of carriage relieving the carrier *or the ship* from liability . . . or lessening such liability," 46 U.S.C. app. § 1303 (emphasis, the court's), a clear reference to an *in rem* proceeding. **That language would be rendered meaningless if an *in rem* action were viewed simply as a procedural device not protected under § 3(8)** as interpreted by *Sky Reefer*. Nor is the Court persuaded by the Ninth Circuit's recent decision in *Fireman's Fund v. Cho-Yang Shipping Company, Ltd.*, 131 F.3d 1336 (9th Cir. 1997), which reached the opposite conclusion, for **the court there appears wholly to have ignored the above-quoted statutory language that refers to the ship's own liability.**

Int'l Marine Underwriters, et al. v. M/V Kasif Kalkavan, 989 F. Supp. 498, 499 (S.D.N.Y. 1998) (emphasis added).

The Ninth Circuit's apparent misunderstanding regarding the substantive nature of maritime liens, *in rem* actions and the ship's separate liability under COGSA apart from the issuer of the bill of lading was evident in the caption of its initial opinion. (App B at 11a). The Ninth Circuit **removed the ship as a defendant in the caption** and substituted DSR-Senator Line as a "defendant-appellant." DSR-Senator Lines was not named as a defendant and was not a party to the action. After FFIC filed its petition for rehearing, the Ninth Circuit filed its amended opinion (App. A at 1a) changing only the caption to return the ship as a defendant and removing DSR-Senator Lines as a party. Nonetheless, the Ninth Circuit thereafter denied the petition for rehearing. (App. E at 20a). The amended opinion provides no explanation of the reason for the change in the caption and, in fact, is exactly the same as the one initially filed save for the change in the caption.

Since a maritime lien is enforceable only by an *in rem* action against the vessel and since Korea does not recognize such an action, the Ninth Circuit's decision extinguished FFIC's perfected maritime lien. This result not only violates a strong United States public policy but clearly conflicts with this Court's mandate that it would have little hesitation in condemning a choice-of forum and choice-of-law clause that operated in tandem as a prospective waiver of a party's right to pursue statutory remedies.

FFIC respectfully requests that this Court grant review to correct the Ninth Circuit's error and to provide guidance to district courts facing this issue.

IV.

THE QUESTION PRESENTED IS IMPORTANT.

The Ninth Circuit's decision stands in conflict with decisions of this Court and every circuit court that has faced the issue of

whether the ship can exempt itself from a maritime lien for cargo damage. The decision has already caused confusion and conflict in the district courts and will no doubt cause more until the issue is clarified: Does a foreign forum selection clause override § 1303(8) of COGSA where cargo's maritime lien for cargo damage cannot be enforced in the foreign forum? Only this Court can answer the question and resolve the conflict.

The question is not in any way trivial. The United States is the major player in international trade, importing and exporting a huge volume of commercial and consumer goods, from automobiles to coffee. The overwhelming majority of those goods are transported by ocean carrier under a bill of lading subject to United States COGSA. The great majority of the goods are carried on board foreign vessels. As a result of the Ninth Circuit's decision, there is nothing to prevent any ocean carrier from inserting into its bill of lading a clause requiring cargo loss or damage litigation in a court in a jurisdiction that does not recognize the carrying **ship's** separate liability and obligations to cargo. Every vessel carrying cargo to or form the United States could thereby be **exempted** from all liability as surely as if a clause stating "No maritime liens for damage to cargo shall attach to the vessel," was enforced.

Congress made clear in enacting COGSA that bill of lading clauses exempting the carrier or the **ship** from liability were null and void. COGSA made clear that the **ship** was to be considered a separate legal entity, apart from the carrier issuing the bill of lading, with the same obligations to safely deliver cargo to its destination. This Court made clear in *Sky Reefer* that it would not hesitate to condemn a choice-of-forum and choice-of-law clause that operated as a prospective waiver of a party's right to pursue statutory remedies.

CONCLUSION

It is respectfully suggested that this Court should not hesitate to grant review to make clear whether or not a forum selection clause that effectively exempts the ship from liability for loss or damage to cargo violates § 1303(8) of COGSA and U.S. public policy.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 30, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FIREMAN'S FUND INSURANCE COMPANY,

Plaintiff-Appellee,

v.

M.V. DSR ATLANTIC, her engines, tackle, machinery, etc., in rem; CHO YANG SHIPPING COMPANY, LTD.; a corporation,

Defendants-Appellants.

No. 96-15734

D.C. No. CV-95-01023-SI

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted
May 8, 1997—San Francisco, California

Filed December 30, 1997
Amended March 10, 1998

Before: Procter Hug, Jr., Chief Judge, Alfred T. Goodwin, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

SUMMARY

Admiralty/Contracts

The court of appeals reversed an order of the district court. The court held that the unavailability of in rem proceedings

in the designated foreign courts does not bar enforcement of a forum-selection clause in an overseas shipping contract.

Appellant Cho Yang Shipping Company, a Korean corporation, issued a bill of lading to Hildebrand France for the carriage of wine and spirits aboard *DSR Atlantic* from France to Oakland, California, for delivery to Chalone, Inc. The bill of lading provided that the underlying contract was governed by the law of Korea, and that all claims arising under it were to be determined only by courts in Seoul. Appellant DSR-Senator Line owned *DSR Atlantic*; Cho Yang had authorization to issue bills of lading for carriage of cargo aboard DSR-Senator's ships.

The cargo was damaged enroute from France to Oakland. Appellee Fireman's Fund Insurance Company (FFIC) was the insurer of the cargo and paid Chalone for the loss. FFIC filed a federal action in personam against Cho Yang and in rem against *DSR Atlantic*. The defendants moved to dismiss, invoking the forum-selection clause. FFIC asserted that the provision was unenforceable because in rem proceedings are unavailable in Korean Courts, and because it violated the Carriage of Goods by Sea Act (COGSA) by depriving Chalone of a legal basis for the vessel's liability.

The district court denied the motion for lack of jurisdiction, ruling that under COGSA, the forum-selection provision was unenforceable because it lessened liability of the carrier. The court certified the issue for appeal. Cho Yang and DSR-Senator appealed.

[1] A forum-selection clause is prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances. Enforcement is unreasonable when it would contravene a strong public policy of the forum in which the suit is brought.

[2] FFIC did not show that enforcement of the forum-selection clause at issue was unreasonable. Insofar as litigat-

ing in Korea might have represented a serious inconvenience to FFIC, the Supreme Court has rejected that claim. FFIC did not meet the heavy burden of proof required to reject enforcement of the clause on this ground.

[3] Nor did the clause contravene a strong public policy of the forum in which the suit was brought. Although litigating in Korea would deprive FFIC of its right to proceed in rem, the loss of that right was insufficient to invalidate the forum-selection clause on public policy grounds.

[4] There was also no merit to FFIC's claim that the forum-selection clause should be invalidated because the bill of lading was a contract of adhesion. The Supreme Court has upheld an arbitration clause even though it appeared in a standard bill of lading. The authority that FFIC cited to support the contention that bills of lading are contracts of adhesion failed to support the claim that the forum-selection clause should be invalidated on this ground.

[5] All cargo shipments carried by sea to or from the United States are subject to COGSA, which provides that any clause in a carriage contract relieving the carrier or the ship from liability for loss or damage, or lessening such liability, is null and void and of no effect. [6] Nothing in COGSA prevents the parties from agreeing to enforce the requirements of the statute in a particular forum. [7] The question is not whether the foreign forum will apply COGSA itself, but whether the substantive law to be applied will reduce the carrier's obligation to the cargo owner below what COGSA guarantees.

[8] The mere unavailability of in rem proceedings does not constitute a lessening of the *specific liability* imposed by COGSA. Rather, it presents a question of the means of enforcing that liability. There was uncontroverted evidence that Korean law would be at least as favorable as COGSA to FFIC. Korean law therefore did not reduce the carrier's obli-

gation below what COGSA guarantees. The district court erred in finding that litigation in Korea would lessen liability to FFIC. The forum-selection clause was enforceable.

COUNSEL

William M. Duncan, Morrison, Mahoney & Miller, San Francisco, California, for defendant-appellant Cho Yang Shipping Company, Ltd., and James J. Tamulski, Kay, Rose & Partners, San Francisco, California, for defendant-appellant M.V. DSR Atlantic.

Stanley L. Gibson, Derby, Cook, Quinby & Tweedt, San Francisco, California, for the plaintiff-appellee.

ORDER

The caption in the Opinion appearing at 131 F.3d 1336 (9th Cir. 1997) (advance sheets) is revised as follows:

Delete "CHO YANG SHIPPING COMPANY, LTD.; DSR-Senator Line," and substitute "M.V. DSR ATLANTIC, her engines, tackle, machinery, etc., in rem; CHO ~~YANG~~ SHIPPING COMPANY, LTD., a corporation," in its place.

OPINION

HAWKINS, Circuit Judge:

We consider the enforceability of a foreign forum selection clause in a contract for a wine shipment from France to California by a Korean shipper. We disagree with the district court that the unavailability of in rem proceedings in Korea renders the clause unenforceable. We hold that the foreign

forum selection clause at issue in this litigation neither lessens liability under the Carriage of Goods at Sea Act nor violates public policy, and we reverse.

FACTUAL AND PROCEDURAL HISTORY

On November 24, 1992, appellant Cho Yang, a Korean corporation, issued a bill of lading to shipper J.F. Hildebrand France for the carriage of wine, cognac, and armagnac aboard the DSR Atlantic from France to the port of Oakland, California, for delivery to consignee Chalone, Inc. DSR-Senator Lines owns the DSR Atlantic, but Cho Yang had authorization to issue bills of lading for carriage of cargo aboard DSR-Senator Lines' vessels. The bill of lading contained the following language:

> The contract evidenced by or contained in this Bill of Lading is governed by the law of Korea and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Seoul and no other courts.

Plaintiff-appellee Fireman's Fund Insurance Co. ("FFIC") insured the cargo aboard the DSR Atlantic, which suffered freeze damage en route from France to California. FFIC paid Chalone for the damage to the cargo, then filed the instant action against in personam defendant Cho Yang and in rem defendant the DSR Atlantic. FFIC asserted in its complaint that defendants were liable for the damage to the insured cargo. Defendants asserted as a defense that the forum selection clause was enforceable and operated to deprive the district court of subject matter jurisdiction. The parties agree that in rem proceedings are unavailable under Korean law.

The district court refused to enforce the forum selection clause and denied appellants' motion to dismiss for lack of jurisdiction. The court certified this issue of first impression

for interlocutory appeal and stayed the action pending outcome of this appeal.

STANDARD OF REVIEW

We review for abuse of discretion the district court's refusal to enforce the forum selection clause. *Arqueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 323 (9th Cir. 1996).[1]

ANALYSIS

We are asked to decide whether the recent Supreme Court decision in *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 115 S. Ct. 2322 (1995), compels enforcement of this foreign forum selection clause. We hold that it does.

[1] A forum selection clause is "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). Enforcement is "unreasonable" where it would "contravene a strong public policy of the forum in which suit is brought." *Id.* at 15.

[2] FFIC has not shown that enforcement of the forum clause at issue here would be unreasonable. Insofar as litigating in Korea might represent a "serious inconvenience" to FFIC, the Supreme Court rejected that claim in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991). FFIC

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[1] In recent years, several of our sister circuits have adopted de novo review of the enforceability of forum selection or arbitration clauses. *See, e.g., Mitsui & Co. v. Mira M/V*, 111 F.3d 33, 35 (5th Cir. 1997); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229 (6th Cir. 1995); *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992). We are bound to follow Ninth Circuit precedent, but note that our result would be the same under either standard of review.

has not met the "heavy burden of proof" required to reject enforcement of the forum clause on this ground. *Id.* at 595.

[3] Nor does the clause "contravene a strong public policy of the forum in which suit is brought." *The Bremen,* 407 U.S. at 15. Although litigating in Korea will deprive FFIC of its right to proceed in rem against The Atlantic, the loss of that right is insufficient to invalidate the forum clause on public policy grounds. The right to proceed in rem — based on the legal fiction of vessel as wrongdoer — certainly has a long and important history. *See, e.g., The China,* 74 U.S. (7 Wall.) 53, 68 (1868) (in rem admiralty proceedings have their source "in the commercial usages and jurisprudence of the middle ages"). Nevertheless, "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control . . . ." *The Bremen,* 407 U.S. at 15. Moreover, "the legal fiction of vessel apart from owner has not been applied when it would frustrate" other compelling interests. *See All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu,* 7 F.3d 1427, 1431 (9th Cir. 1993) (listing cases). We therefore hold that the inability to proceed in rem is not sufficient to require us to set aside the forum clause on public policy grounds.

[4] We also find no merit to FFIC's claim that we should invalidate the clause because the bill of lading in which it appeared was a contract of adhesion. First, we note that in *Sky Reefer,* the Supreme Court upheld the arbitration clause at issue even though it appeared in a "standard form bill of lading." *See* 115 S. Ct. at 2325; *see also Carnival Cruise Lines,* 499 U.S. at 593 (upholding "nonnegotiated forum-selection clause" that appeared in "form ticket contract"). Second, the authority that FFIC cites to support the contention that bills of lading are contracts of adhesion, *Hanjin Yosu,* fails to support the further claim that we should invalidate the forum clause on this ground.

In *Hanjin Yosu,* we held that:

> Bills of lading are contracts of adhesion, usually drafted by the carrier, and are therefore strictly construed against the carrier. Any ambiguity in the bill of lading must be construed in favor of the shipper and against the carrier.

7 F.3d at 1431 (internal quotations and citations omitted). The bill of lading at issue in this case unambiguously mandates that "the courts in Seoul and no other courts" are to adjudicate "any claim or dispute" that arises. As we find no ambiguity in the forum clause, whether or not the bill of lading is a contract of adhesion is of no relevance to the result we reach in this matter.

[5] FFIC's final challenge to the forum selection clause, and the one that the district court accepted in invalidating the clause, is that the clause violates the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. § 1300 *et seq.* All cargo shipments carried by sea to or from the United States are subject to COGSA, *see* 46 U.S.C. App. § 1312, which provides in section 3(8) that "[a]ny clause . . . in a contract of carriage relieving the carrier or the ship from liability for loss or damage . . . or lessening such liability . . . shall be null and void and of no effect." *Id.* § 1303(8).

Prior to *Sky Reefer,* most courts followed *Indussa Corp. v. S.S. Ranborg,* 377 F.2d 200 (2d Cir. 1967) (en banc), which held that COGSA § 3(8) prevented enforcement of foreign forum selection clauses in bills of lading. *See North River Ins. Co. v. Fed Sea/Fed Pac Line,* 647 F.2d 985, 988 (9th Cir. 1981) (listing district courts that had followed *Indussa* in the Ninth Circuit). *Indussa* recognized the cost of litigating in a distant forum established " 'a high hurdle' in the way of enforcing liability," and that such an impediment to enforcement lessened liability in violation of COGSA § 3(8). 377 F.2d at 203.

[6] *Sky Reefer* rejects the reasoning and the conclusion of *Indussa, see* 115 S. Ct. at 2326, and holds that increased litigation costs do not invalidate a forum selection clause under COGSA § 3(8). *Id.* at 2328. Although *Sky Reefer* concerned a foreign arbitration clause — whereas *Indussa* concerned a "true" foreign forum selection clause — *Sky Reefer* makes clear that "foreign arbitration clauses are but a subset of foreign forum selection clauses in general." *Id.* at 2326; *see also id.* at 2327 ("Nothing in [COGSA § 3(8)] suggests that the statute prevents the parties from agreeing to enforce [the requirements of COGSA] in a particular forum."). We agree with appellants that the *Sky Reefer* holding applies equally to forum selection clauses and arbitration clauses.[2] *See Mitsui & Co. v. Mira M/V,* 111 F.3d 33, 36 (5th Cir. 1997) (extending *Sky Reefer* to forum selection clauses).

The district court found that FFIC's case here certainly benefitted from and quite possibly depended on the in rem action against the DSR Atlantic. To the district court, the unavailability of in rem rights in Korea "clearly" lessened liability in violation of COGSA. We think the answer is far from clear.

[7] In applying COGSA, the question is not whether the foreign forum will apply COGSA itself, but "whether the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees." *Sky Reefer,* 115 S. Ct. at 2329. COGSA "guarantees" that the carrier will: "exercise due diligence to . . . [m]ake the ship seaworthy"; "[p]roperly man, equip and supply the ship";

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[2]Justice O'Connor, concurring in *Sky Reefer,* sought to limit the holding of that case to foreign arbitration clauses only. *See* 115 S. Ct. at 2330-31 (O'Connor, J., concurring). The *Sky Reefer* majority *and* dissent both rejected this limitation. *See id.* at 2327; *id.* at 2333 n.7 (Stevens, J., dissenting) ("The majority's reasoning . . . thus presumably covers forum selection as well as arbitration."). We think that the language and reasoning of *Sky Reefer* strongly support extending that case to foreign forum selection clauses.

"[m]ake the . . . parts of the ship in which goods are carried . . . fit and safe"; "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"; and, "issue to the shipper a bill of lading" with specified contents. 46 U.S.C. App. § 1303 (1) - (3). According to *Sky Reefer,* "[t]hese are the substantive obligations and particular procedures that § 3(8) prohibits a carrier from altering to its advantage in a bill of lading." 115 S. Ct. at 2327.

[8] Thus, the mere unavailability of in rem proceedings does not constitute a "lessening of the *specific liability* imposed by [COGSA]," *id.* at 2327 (emphasis added); rather, it presents a "question of the means . . . of enforcing that liability." *Id.* Appellants have presented uncontroverted evidence that Korean law will be at least as favorable as COGSA to FFIC; Korean law therefore will not "reduce the carrier's obligations . . . below what COGSA guarantees." *Id.* at 2329. We believe the district court erred in finding that litigation in Korea would lessen appellants' liability to FFIC in this matter. The foreign forum selection clause at issue is enforceable.

REVERSED and REMANDED to the district court with instructions to dismiss the matter for want of jurisdiction.

APPENDIX B — CAPTION FROM THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 30, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-15734

D.C. No. CV-95-01023-SI

FIREMAN'S FUND INSURANCE COMPANY,

Plaintiff-Appellee,

v.

CHO YANG SHIPPING COMPANY, LTD.; DSR-SENATOR LINE,

Defendants-Appellants.

OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted
May 8, 1997—San Francisco, California

Filed December 30, 1997

Appendix B

Before: Procter Hug, Jr., Chief Judge, Alfred T. Goodwin, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

SUMMARY

Admiralty/Contracts

The court of appeals reversed an order of the district court. The court held that the unavailability of in rem proceedings in the designated foreign courts does not bar enforcement of a forum-selection clause in an overseas shipping contract.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 25, 1996

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-80128

DC# CV-95-1023-SYI
Northern California

FIREMAN'S FUND INSURANCE COMPANY,

Plaintiff-Respondent,

vs.

CHO YANG SHIPPING COMPANY, LTD.,

Defendant-Petitioner.

ORDER

Before: HALL and RYMER, Circuit Judges

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. The petitioner shall perfect its appeal pursuant to Fed. R. App. P. 5(d).

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DENYING DEFENDANTS' MOTION TO DISMISS FILED DECEMBER 1, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-95-1023 SI

FIREMAN'S FUND INSURANCE CO.,

Plaintiff,

v.

MV DSR ATLANTIC, in rem; CHO YANG SHIPPING CO.,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

On November 17, 1995, the Court heard argument on the defendants' motion to dismiss for lack of subject matter jurisdiction. Having considered the arguments of counsel and the papers submitted, the Court hereby DENIES the defendants' motion.

BACKGROUND

On November 24, 1992, defendant Cho Yang Shipping Company (a Korean company) issued a bill of lading[1] to Chalone,

1. A bill of lading is a receipt given by the carrier to the shipper demonstrating that a contract exists between the two. Although the bill of lading (Cont'd)

Inc.,[2] for the carriage of cargo from France to Oakland, California. The bill of lading contained a forum selection clause whereby any claim or dispute that arises under it must be resolved by the courts in Seoul, Korea. Plaintiff, Fireman's Fund, is the subrogated insurer of Chalone, Inc., and filed suit on March 23, 1995, against both Cho Yang and M/V DSR Atlantic alleging that the cargo was damaged in transit. Fireman's Fund paid Chalone $132,885.83 for the damage to the goods. Fireman's Fund now seeks to recover that money by subrogation from the *in personam* defendant Cho Yang Shipping Company, Ltd., and from *in rem* defendant M/V DSR Atlantic.[3] The vessel, DSR Atlantic, is owned by DSR Senator Lines, a company unrelated to defendant Cho Yang.

The bill of lading that is at issue in this case states the following:

> The contract evinced by or contained in this Bill of Lading is governed by the law of Korea and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Seoul and no other courts.

(Cont'd)
represents a contract between a shipper and a carrier, a consignee may bring suit on a bill of lading for damaged goods. *Kannematsu Corp. v. M/V Gretchen*, 1995 U.S. Dist. Lexis 13975 at p. 8 (Sept. 15, 1995, D. Ore.) (citations omitted).

2. A consignee is the party designated to receive the shipped goods from the carrier.

3. The vessel itself can beheld liable as a carrier. This *in rem* action is a kind of maritime lien. "This Circuit recognizes a maritime tort lien irrespective of contractual obligations." *Albany Ins. Co. v. M/V ISTRIAN EXPRESS*, 61 F.3d 709, 710 (9th Cir. 1995).

Appendix D

A clause on the reverse side of the bill of lading states that, for shipments to or from the United States, the governing law is the Carriage of Goods by Sea Act, 46 U.S.C. § 1301 *et seq*. (hereafter "COGSA").[4]

Defendant Cho Yang filed its answer in March of 1995, and an amended answer in August of 1995. In both the original and the amended answers, defendant Cho Yang admitted that "the court has admiralty and maritime jurisdiction and that the complaint is an admiralty claim within the meaning of FRCP 9(h)." (Answer, p. 1:21-24; Amended Answer p. 1:24-26). In its August amended answer, Cho Yang added, as an affirmative defense, the contention that this court lacks subject matter jurisdiction, because of the Korean forum-selection clause in the bill of lading. In both answers, defendant Cho Yang stated that it relies "[u]pon all defenses available to it under the terms of those bills of lading, including all printed, typed, stamped or handwritten clauses or terms thereof."

Cho Yang brings the present motion to enforce the forum selection clause by dismissing the plaintiffs action, leaving plaintiff to prosecute this claim in the Korean forum.[5] DSR Senator Lines (claimant to the vessel) joins defendant Cho Yang's motion to dismiss and has filed a "Statement of Position" and memorandum in response to Fireman's Fund's opposition to Cho Yang's motion to dismiss.

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4. Despite this language, defendants state that in fact Korean law (the Korean Commercial Code), not COGSA, would likely be applied in this case if it were to be litigated in Korea.

5. Alternatively, Cho Yang moves for summary judgment. However, this motion has not been properly brought as motion for summary judgment, and will be considered by the Court as a motion to dismiss for lack of subject matter jurisdiction.

Appendix D

DISCUSSION

Defendant Cho Yang argues that the recent Supreme Court case, *Vimar Seguros y Reaseguros S.A. v. M/V SKY REEFER*, 515 U.S. __ , 132 L.Ed.2d 462 (1995), compels dismissal of this action.

Prior to the *SKY REEFER* decision, most courts (including the 9th Circuit) followed the rule articulated by the Second Circuit in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), which held that Section 3(8) of COGSA[6] invalidates clauses in bills of lading which require resolution of disputes in a foreign judicial forum. The *Indussa* court reasoned that such provisions would "put[ ] a 'high hurdle' in the way of enforcing liability," and found that the inconvenience and cost of litigating in a foreign forum could "lessen liability" within the meaning of COGSA.

The Supreme Court in *SKY REEFER* rejected the reasoning and conclusion of *Indussa*, and held that clauses contained in bills of lading which mandate foreign arbitration, are not per se unenforceable or violative of COGSA "in all circumstances." *Id.* at 476. As stated by Justice O'Connor in her concurrence, "[T]he increased cost of litigating in a distant forum, without more,"

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6. COGSA regulates the terms of bills of lading issued by ocean carriers transporting cargo to or from the ports of the United States. Section 3(8) of COGSA, codified at 46 U.S.C. App. § 1303(8) states in pertinent part:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or *lessening such liability* otherwise than as provided in this chapter, shall be null and void and of no effect (emphasis added).

may not be treated as "lessening liability" within the meaning of COGSA §3(8). *Ibid.* Cho Yang contends that the same analysis should apply to a forum selection clause (as is present here) as applies to an arbitration provision, since arbitration is merely a subset of judicial forum-selection.

This Court agrees with defendant that the *SKY REEFER* holding should be applied to foreign forum selection clauses as well as arbitration clauses. However, that does not end the analysis. It must still be determined, in accordance with *SKY REEFER*, whether for reasons other than the increased cost of litigating in a distant forum, the liability of the carrier or the ship would be "lessened" by enforcing the forum selection clause. Forum selection clauses may still run afoul of COGSA if the "choice-of-forum and choice-of-law clauses [would operate] in tandem as a prospective waiver of a party's right to pursue statutory remedies," or if "the foreign court chosen as the exclusive forum would apply a domestic substantive law which would result in limiting the carrier's liability to a sum lower than that to which he would be entitled if [English COGSA] applied." *Ibid.*

Here, the forum selection clause requiring litigation in Korea pursuant to Korean law would "lessen liability" within the meaning of COGSA § 3(8). It is undisputed that Korea does not recognize the American maritime action *in rem* and that plaintiff would consequently be unable to charge or enforce its claims against defendant MV DSR ATLANTIC. In U.S. courts, by contrast, plaintiff is entitled to pursue the vessel itself in order to secure any judgment it may obtain against the carrier, Cho Yang. This remedy is a valuable one.

Defendant argues, correctly, that COGSA only requires that the foreign law in question be as favorable to the shipper as the

law that would be applied if the case were to proceed in the United States. Defendant goes on to argue, incorrectly in the Court's view, that Korean law is in fact as "favorable" to plaintiff because plaintiff's *in rem* rights against defendant MV DSR ATLANTIC are trivial. However, the *in rem* remedy is significant not only because of the additional security it provides but also because, "[u]nder plaintiff's security agreement with DSR Atlantic's insurer, the insurer is only required to pay if judgment is rendered against the DSR Atlantic." (Pl. Opp. Br. at 8).

Defendant Cho Yang admits that Korean law does not recognize actions *in rem*. Thus, plaintiff's rights are clearly "lessened" within the meaning of section 3(8) of COGSA.

Accordingly, because of the circumstances presented in this case, the Court finds the forum selection clause to be unenforceable.

CONCLUSION

For the forgoing reasons, the defendant's motion to dismiss for lack of subject matter jurisdiction is DENIED.

IT IS SO ORDERED

Dated: November 30, 1995.

s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 12, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-15374

D.C. No. CV-95-01023-SI
(Northern California)

FIREMAN'S FUND INSURANCE COMPANY,

Plaintiff - Appellee,

v.

M.V. DSR ATLANTIC, her engines, tackle, machinery, etc., in rem; CHO YANG SHIPPING COMPANY, LTD.; a corporation,

Defendants - Appellants.

ORDER

BEFORE: HUG, Chief Judge, GOODWIN, and HAWKINS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F — STATUTES INVOLVED

Carriage of Goods by Sea Act (COGSA)

46 U.S.C. §§ 1300-1315

§ 1300 Bills of lading subject to chapter.

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade shall have effect subject to the provisions of this chapter.

§ 1301 Definitions.

When used in this chapter —

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the sum.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

§ 1302 Duties and rights of carrier.

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this tide.

§ 1303 Responsibilities of carrier and ship.

[1] — Seaworthiness.

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to —

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

[2] — Cargo.

The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Appendix F

[3] — Contents of bill.

After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things —

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the eases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*. That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

[4] — Bill as prima facie evidence.

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c) of this section: *Provided*. That nothing in this chapter shall be construed as

repealing or limiting the application of any part of sections 81 to 124 of Title 49.

[5] — Guaranty of statements.

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

[6] — Notice of loss or damage; limitation of actions.

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract or carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods described in the bill of lading, If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof,

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided.* That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

[7] — "Shipped" bill of lading.

After the goods as loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided.* That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

[8] — Limitation of liability for negligence.

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in

favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

§ 1304 Rights and immunities of carrier and ship.

[1] — Unseaworthiness.

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthniness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

[2] — Uncontrollable causes of loss.

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from —

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint or princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission at the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial general: *Provided.* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence;

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

[3] — Freedom from negligence.

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

[4] — Deviations.

Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed in an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however.* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

[5] — Amount of liability; valuation of cargo.

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $300 per package lawful money of the United States, or in case of goods not shipped

in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the in the bill of lading. This declaration if embodied in the bill of lading, shall be prima facie, evidence but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*. That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

[6] — Inflammable, explosive, or dangerous cargo.

Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Appendix F

§ 1305 Surrender of rights; increase of liabilities; charter parties; general average.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

§ 1306 Special agreement as to particular goods.

Notwithstanding the provisions of sections 1303 to 1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided,* That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided*. That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

§ 1307 Agreement as to liability prior to loading or after discharge.

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

§ 1308 Rights and liabilities under other provisions.

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

§ 1309 Discrimination between competing shippers.

Nothing contained in this chapter shall be construed as permitting a common carrier by water to discriminate between

competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title; or (c) in any other way prohibited by the Shipping Act 1916, as amended.

§ 1310 Weight of bulk cargo.

Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight to be inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

§ 1311 Liabilities before loading and after discharge; effect on other laws.

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Appendix F

§ 1312 Scope of chapter; "United States"; "foreign trade."

This chapter shall apply to all contracts for carriage of goods by sea to or from ports to the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however.* That any bill of lading or similar document of title which is evidence of a contact for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided further.* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

§ 1313 Suspension of provisions by President.

Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them of sections 1301 to 1308 of this title or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such

suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this chapter, effective during any period when sections 1301 to 1308 of this title, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

§ 1314 Effective date; retroactive effect.

This chapter shall take effect ninety days after April 16, 1936; but nothing in this chapter shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

§ 1313 Short title.

This chapter may be cited as the "Carriage of Goods by Sea Act."

MOTION FILED

JUL 13 1998

No. 97-1999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

vs.

M.V. DSR ATLANTIC, her engines, tackle, machinery, etc., in rem.; CHO YANG SHIPPING COMPANY, LTD. a corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Institute of Marine Underwriters ("AIMU") hereby respectfully requests permission to file a brief *amicus curiae* in this matter.[1] Written consent of all parties has been

1. The invaluable assistance of Elura Nanos and Bill N. Zois, students at New York Law School, in drafting this motion and brief *amicus curiae* is gratefully acknowledged.

duly requested. Petitioner has consented to the filing of this brief. Respondent Cho Yang Shipping Company, Ltd. also has consented to the filing of the attached brief. Respondent M.V. DSR ATLANTIC has refused to consent. Letters consenting to the filing of this brief signed by counsel for the Petitioner and counsel for Cho Yang Shipping Co., Ltd. have been filed with the Clerk of this Court.

AIMU was founded in 1898 and is a national trade association comprised of over ninety insurance companies, each of which is authorized to engage in the business of marine insurance in one or more states of the United States. Because its membership underwrites approximately ninety percent of the marine insurance written in the United States, the issues of this case are of extreme importance to AIMU and its member companies.

The United States is the world's leading exporter. TRADE PROMOTION COORDINATING COMMITTEE, THE NATIONAL EXPORT STRATEGY: CORNERSTONE FOR GROWTH 3 (Oct. 1997). International trade is an integral and vital part of the U.S. economy. In fact, one-third of the economic growth in the U.S. economy over the last five years has been dependent on overseas trade. *Id.* Cargo insurance and the ability to recover from vessels and vessel owners for damage to cargo plays an important role in providing the security necessary for such trade. The decision below threatens that security. This concern for security is heightened by the fact that the current Asian financial crisis makes the need for *in rem* rights against a vessel to secure cargo damage claims all the more compelling.

AIMU's interest in this appeal also stems from its efforts to maintain certainty and uniformity in maritime law throughout the United States. Particularly, the underwriters of AIMU are concerned about the inconsistency among federal admiralty

courts as to whether a foreign forum selection clause in a bill of lading may effectively relieve a vessel of all statutory liability for cargo damage when the jurisdiction specified does not recognize a maritime lien for cargo damage or *in rem* actions against a vessel. Moreover, AIMU is interested in the uniform application of maritime laws, such as COGSA § 1303(8), and the precedent set by this Court in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) ("*Sky Reefer*"). This appeal may finally clarify the scope of both COGSA § 1303(8) and *Sky Reefer*. By determining that forum selection clauses will not be honored when the selected forum does not recognize the underlying cause of action, AIMU can be confident that *in rem* proceedings will continue to be available, and that a cargo owner's maritime lien rights will be adequately protected.

AIMU respectfully prays that this Honorable Court accept its brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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July 13, 1998

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SUMMARY OF THE ARGUMENT

This case raises an important issue which needs to be addressed by this Court: Whether a vessel may avoid liability for cargo loss or damage by inserting a forum selection clause

in bills of lading, and selecting a forum which does not recognize maritime liens or *in rem* admiralty proceedings?[1] There are two main reasons why this issue should be addressed:

i) a forum selection clause which extinguishes *in rem* liability of a vessel violates cargo owners' maritime rights under COGSA; and

ii) the decision below improperly applies this Court's decision in the *Sky Reefer* and differs with other Circuits.

The Ninth Circuit has allowed the vessel DSR ATLANTIC to circumvent COGSA through a forum selection clause in a bill of lading. The decision below permits a vessel to free itself of all liability arising from cargo damage by unilaterally extinguishing rights to maritime liens and *in rem* actions. The lower court would eradicate statutory vessel liability by permitting a carrier merely to insert a forum selection clause which specifies that disputes are to be governed in a jurisdiction that does not recognize maritime liens or *in rem* actions. As a result, the claim brought by Fireman's Fund Insurance Company ("Fireman's Fund"), the insurer of the cargo, cannot be adjudicated and its rights cannot be enforced. The instant case allows the Court an opportunity to clarify further its decision in *Sky Reefer* on the issue of a vessel avoiding statutory *in rem* liability through the unilateral insertion of a clause in a bill of lading.

This issue must be addressed, both because of the widespread impact it will have on international cargo transportation, and because of the need for uniformity in maritime law among the circuits.

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1. No counsel for any party has authored this brief in whole or in part. Only the *amicus curiae*, AIMU, and its counsel have contributed to the preparation and submission of this brief.

ARGUMENT

I

THE DECISION BELOW VIOLATES COGSA

The lower court's overbroad, erroneous interpretation of *Sky Reefer* is in direct conflict with the express statutory provisions in COGSA. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) ("Sky Reefer"); 46 U.S.C. § 1300 *et seq.* (1975) (originally enacted as the Carriage of Goods By Sea Act of Apr. 16, 1936, ch. 229, 49 Stat. 1207) ("COGSA").

> **Any clause**, covenant, or agreement in a contract of carriage **relieving** the carrier or **the ship from liability** for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, **shall be null and void and of no effect**.

46 U.S.C. § 1303(8) (emphasis added). The effectiveness of this provision of COGSA would be completely vitiated if the lower court's decision is allowed to stand.

Until the lower court decision, no American court had permitted the application of a forum selection clause so as to extinguish a maritime lien and deny *in rem* liability under COGSA. This prohibition is so universally acknowledged that even the leading text on admiralty law in the United States declares that a clause in a bill of lading may not be used to void maritime liens and *in rem* liability of a vessel.

> Cogsa and Harter contain prohibitions against the carrier or the vessel's contracting out of these liens.

GRANT GILMORE AND CHARLES BLACK, JR., THE LAW OF ADMIRALTY 187 (2d ed. 1975). Nevertheless, the decision below ignores the prohibitions in COGSA and permits the use of such a clause to violate the prohibition on voiding the *in rem* liability of the ship.

Under the guise of denying a mere "procedural" process to cargo interests, the lower court has in effect abridged a substantive right guaranteed to American exporters and importers. Indeed, the denial of the *in rem* remedy does more than prejudice cargo's substantive rights under COGSA. The availability of the *in rem* remedy is outcome-determinative; without it, cargo's statutory rights against the vessel for loss or damage to cargo are unenforceable. By denying cargo interests the right to the *in rem* remedy, the loss of their other substantive rights against the vessel under COGSA is guaranteed.

In waiving the statutory rights of cargo claimants to *in rem* proceedings against the ship, the lower court revealed a fundamental misunderstanding of this special admiralty proceeding. The maritime lien gives the claimant a property right in the ship. *The Lottawanna*, 88 U.S. 558, 579 (1874); *see also* 2 BENEDICT ON ADMIRALTY § 22 (7th ed. 1997). In some maritime cases, the ship can be liable but not the owner, yet in this case, the lower court would permit the unilateral extinguishing of all rights against the vessel. David J. Sharpe and Philip A. Burns, *Practice and Procedure - Maritime Arrest* § 2 (1994), *in* 5 BENEDICT ON ADMIRALTY (7th ed. 1997). This Court has consistently acknowledged the special characteristics of *in rem* admiralty actions. *See California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464 (Apr. 22, 1998). But the decision below does away with all rights a cargo owner may have against a

ship by eliminating *in rem* liability by sending the action to a forum where it is not recognized.

A procedure unique to American admiralty practice is the action *in rem* against a vessel or other maritime property. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 478 (2d ed. 1994). The *in rem* action is a special admiralty remedy uniquely suited to enforce maritime liens, which are distinctive to admiralty. *Id.* at 502.

> Every valid claim for cargo loss or damage creates a maritime lien against the ship. Thus, where we have spoken of a liability of the "carrier" the reader may supply "and of the ship." Such a lien is of course enforced by the action *in rem*. . . .

GILMORE AND BLACK, *supra*, at 186. The necessity of enforcing the liability of peripatetic ships through *in rem* actions is apparent. Congress acknowledged this when it provided specifically in COGSA for the liability of the ship in recognition of the *in rem* remedy afforded to cargo claimants. *See* COGSA § 1303(8) (making any clause relieving a ship from COGSA liability null and void). The *in rem* remedy is a fundamental substantive right guaranteed by COGSA. The court below erred when it cavalierly dismissed it as mere procedure. App. 3a.[2]

> The *in rem* suit is peculiar to Admiralty law and to understand it one must also understand the concept of "maritime lien." A maritime lien is a privileged claim upon maritime property. For example: following a collision, maritime law gives the aggrieved party — and usually both parties consider themselves the aggrieved party — a privileged claim

2. References to "App." are to the Appendix to Fireman's Fund's Brief on Petition for Writ of Certiorari submitted to this Court.

> or maritime lien against the colliding vessel. This lien is enforced by filing a libel against the offending vessel. Such a proceeding is called a suit *in rem*; the vessel in which a lien is claimed is then taken into the custody of the court or "arrested." In other words, the plaintiff arrests the ship to compel the defendant to appear or to provide security to answer the claim (which may or may not prove to be well founded). This is known as the procedure of Admiralty arrest.
>
> The arrest of a ship puts a very effective pressure on her owner to provide bail or security for the amount of the libel and thereby obtain the release of his ship from arrest. The plaintiff, by the arrest of the ship, immediately obtains security for his claim. If he is ultimately successful in his suit, he can enforce judgment by selling the ship (if she has remained under arrest), or by recovering against the bail or security if the ship has been released. In most cases the defendant obtains the release of his ship by providing acceptable security. . . .

LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 411-12 (2d ed. 1981). It is evident that Congress intended that the liability for cargo damage provided for in COGSA be enforced against the ship through the *in rem* proceeding. 46 U.S.C. §§ 1301(d), 1303(6), 1303(8), 1304(1), 1304(2), 1304(5), 1307 (separate references to "the ship"). Despite the prohibition found in COGSA § 1303(8), the lower court would permit the use of a forum selection clause to deny statutory rights. It is imperative that the decision below be reviewed so that its overreaching application of this Court's decision in the *Sky Reefer* be corrected.

II

THE DECISION BELOW DIFFERS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The court below ignored important language in this Court's *Sky Reefer* decision and applied an overbroad interpretation thereby denying cargo claimants their statutory protections under COGSA. *Sky Reefer*, 515 U.S. at 540-41. This Court reiterated its position in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), specifying that, if a jurisdictional clause in a bill of lading effected a waiver of a right to pursue statutory remedies, then the Court "would have little hesitation in condemning the agreement as against public policy." *Id.* at 637. Certainly, the lower court's decision to allow the vessel DSR ATLANTIC to avoid its obligations under COGSA through a forum selection clause violates public policy. Cargo's *in rem* action to enforce maritime liens will not be permitted in Korean courts; moreover, as the decision stands, there will be no opportunity for an American court to review the matter. By unilaterally inserting a forum selection clause in a bill of lading to require adjudication in a country that does not recognize *in rem* actions, a shipowner can deprive cargo claimants of their statutory rights under COGSA to pursue their claims against a vessel.

The decision below stands in sharp contrast with those of other circuits holding that denial of maritime lien rights by contract violates COGSA. For example, in *Dods Shipping Ltd. of Nassau, N.P. v. Karobi Lumber Co.*, 397 F.2d 570 (5th Cir. 1968), the Fifth Circuit held that an otherwise enforceable charter party clause was void because it "lessened liability" in contravention of the specific aims of COGSA through a lien prohibition clause. Also, in *Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 978 F.2d 47 (2d Cir. 1992), the Second

Circuit held that any attempt by a carrier to limit liability would be unenforceable. "The plain language of section 1303(8) [of COGSA] forbids enforcement of agreements to relieve carriers of liability for negligence." *Id.* at 49. *See also Demsey & Associates, Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1014 (2d Cir. 1972) (COGSA prohibits a shipowner from contracting out of *in rem* liability.).

Because Korean law does not recognize *in rem* rights in cargo damage cases, it is certain that if the instant forum selection clause is enforced, the carrying vessel will be relieved of liability. Under Korean law, the DSR ATLANTIC will not be subjected simply to "lesser" liability, but rather, will avoid liability altogether.

Two federal district courts have also determined that maritime liens and *in rem* actions are substantive rights protected by COGSA. The district court in this action properly determined that to permit adjudication in Korea would lessen the liability of the ship in contravention of COGSA. App. 18a. Because Korea does not recognize American *in rem* actions, cargo claimants would be unable to pursue their claims against the vessel. If the forum selection clause were given effect, COGSA liabilities of the ship would be eradicated and Fireman's Fund's rights would be lessened within the meaning of Section 3(8) of COGSA. App. 19a.

The Southern District of New York recently declared that the language of COGSA "would be rendered meaningless if an *in rem* action were viewed simply as a procedural device and not protected under § 3(8) as interpreted by *Sky Reefer*." *International Marine Underwriters CU v. M/V Kasif Kalkavan*, 989 F. Supp. 498, 499 (S.D.N.Y. 1998) (expressing disagreement with the Ninth Circuit's decision in this case). However, another decision in the same district permitted the

dismissal of an action against a charterer based on a forum selection clause naming Korea. Nevertheless, the cargo claimant was free to proceed against the shipowner and the vessel *in rem* in the U.S. in a duplicative action. *Hyundai Corp. U.S.A., Inc. v. M/V An Long Jiang*, No. 97 CIV. 3855, 1998 WL 13835, 1998 A.M.C. 854 (S.D.N.Y. Jan. 15, 1998).

In another related development, the District of South Carolina recently refused to enforce a forum selection clause because an insurer's right of subrogation is not recognized under Korean law. *Gibbs Int'l, Inc. v. Federal Ins. Co.*, No. 7:95-3571-20, 1997 WL 729077, 1997 A.M.C. 2954 (D.S.C. Feb. 26, 1997). The court was particularly concerned about the potential for greatly diminishing the shipper's right to recover. *Id.* The decision below conflicts with authority on the enforceability of forum selection clauses which would deny cargo shippers' rights against the vessel. The petition should be granted so that the Ninth Circuit decision can be harmonized with COGSA and the great weight of authority.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted in this matter.

The decision, if allowed to stand will cause significant disruption in maritime commerce.

The rights guaranteed by COGSA to cargo owners will be extinguished whenever a carrier unilaterally inserts a clause in a bill of lading forcing cargo damage claims litigation to forums such as Korea which do not allow *in rem* proceedings against a vessel.

For the reasons set forth herein, it is respectfully submitted that the decision of the court below is erroneous and should be reviewed by this Court.

Respectfully submitted,

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July 13, 1998

No. 97-1999

In The

Supreme Court of the United States

October Term, 1997

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

v.

M.V. DSR ATLANTIC, her engines, tackle, machinery, etc., in rem; CHO YANG SHIPPING COMPANY, Ltd. a corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

For over a quarter-century, this Court has consistently recognized a general rule favoring the enforcement of forum selection clauses. Three years ago, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), the Court held that this general rule applies in the bill of lading context. Does the unavailability of an *in rem* procedure in a foreign jurisdiction defeat this general rule?

RULE 29.6 STATEMENT

The Motor Vessel DSR Atlantic was owned by DSR-Senator Lines at the time that petitioner threatened to arrest it. DSR-Senator Lines' parent company is Hanjin Shipping. DSR-Senator Lines has no nonwholly owned subsidiaries.

DSR-Senator Lines was, at the relevant time, a member of the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, a mutual insurance association (known as a "P & I Club") whose members are shipowners from around the world. The Club has neither parent companies nor nonwholly owned subsidiaries. The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited would be liable for any final judgment in this action against either M.V. DSR Atlantic or DSR-Senator Lines.

Cho Yang Shipping Company's parent companies are:

Krota Sea-Land Transportation Ltd.
Nambuk Fisheries Co., Ltd.
Pieris Investments PTE, Ltd.

Cho Yang Shipping Company's nonwholly owned subsidiaries are:

Chang Won Development Co., Ltd.
Cho Yang (America), Inc.
Cho Yang (Cyprus) Shipping Ltd.
Dong Young Shipping Co., Ltd.
First Building Management Co., Ltd.
First Life Insurance Co., Ltd.
Hanshim Mutual Savings & Finance Co.
Jinju Ham Co., Ltd.

RULE 29.6 STATEMENT – Continued

Nambuk Fisheries Co., Ltd.
Samik Express Co., Ltd.

Cho Yang Shipping Company is a member of the Steamship Mutual Underwriting Association (Bermuda) Limited, another P & I Club whose members are shipowners from around the world. This Club also has neither parent companies nor nonwholly owned subsidiaries.

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INTRODUCTION

The real issue in this case is the continued validity of this Court's decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). Prior to *Sky Reefer*, the courts of appeals held that forum selection clauses in bills of lading are invalid under section 3(8) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. § 1303(8), which prohibits a carrier from lessening its liability for cargo loss or damage except as permitted in the Act. *See, e.g., Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc). In *Sky Reefer*, this Court, rejecting the *Indussa* reasoning, held that section 3(8) applies only when a carrier seeks to lessen its substantive liability. 515 U.S. at 534-35. It does not apply to the procedures – such as the selection of a forum – that are available to enforce the carrier's substantive liability. *Ibid.* Thus even bill of lading cases governed by COGSA are subject to the general rule favoring the enforcement of forum selection clauses that this Court first announced in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and reaffirmed in *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

The availability of *in rem* procedures in the United States is completely irrelevant here except to the extent that petitioner can use their nonavailability in Korea (due to Korea's nonrecognition of a maritime lien in this context) as a justification for avoiding the forum selection clause in the bill of lading. If this Court were to reverse the decision below and order the case to go forward in the district court, petitioner would derive no further benefit whatsoever from the U.S. *in rem* procedures. Contrary to petitioner's assertion, *see* Petition for Writ of Certiorari ("Pet.") at 3 ¶ 3, the ship's insurers would be liable "[i]n

the event that a final decree, after appeal, if any, be entered . . . against DSR Atlantic *or her owners* [DSR-Senator Lines]," *see* Excerpts of Record ("ER") at 70 ¶ 2 (emphasis added). In any event, the *in personam* liability of respondent Cho Yang (which is also backed by adequate insurance) is more than sufficient to satisfy any judgment that petitioner might obtain.

Petitioner's real concern here is the same as the cargo claimant's concern in *Sky Reefer*. Having begun the action in the United States in violation of the forum selection clause, it does not want to face the expense and inconvenience of bringing its action in a foreign forum. *See* 515 U.S. at 535-36. Thus petitioner argues that public policy requires the U.S. courts to retain jurisdiction. But this dispute is between the experienced and sophisticated U.S. subsidiary of a German insurance company and two foreign carriers (German and Korean), whose liability, if any, will be borne by multinational insurers based in England; it involves damage suffered either in France or the mid-Atlantic. Although the U.S. courts might be an appropriate forum for this dispute (in the absence of a forum-selection clause), no public policy requires it to be heard in the United States.

REASONS FOR DENYING THE WRIT

If there were a clear conflict among the courts of appeals on an important issue regarding the enforceability of forum selection clauses in bills of lading, and if no other method were realistically available to resolve the conflict, it might be appropriate for this Court to address

the issue in a case that directly raises the question presented. At the moment, however, there is no conflict in the lower courts of any kind. Indeed, this is the first case explicitly to address the question presented, and the only appellate case to do so. Furthermore, Congress is already considering the subject, so any ruling by this Court would likely be of limited importance. Under the current COGSA, the decision below is nothing more than a routine (and correct) application of *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). It does not warrant further review.

I. THIS COURT'S REVIEW OF THE QUESTION PRESENTED WOULD BE PREMATURE AT THIS TIME

In view of this Court's limited resources, certiorari should be granted only in cases that require the Court's immediate attention. When there is no conflict among the lower courts, when the lower courts have barely addressed the issues involved, and when Congress is already considering proposed legislation that would resolve the question presented, then review by this Court would be premature.

A. THERE IS NO CONFLICT AMONG THE LOWER COURTS ON THIS ISSUE

Petitioner does not even claim an inter-circuit conflict on the real issue presented by this case, *i.e.*, whether the unavailability of an *in rem* procedure in a foreign jurisdiction defeats a bill of lading's forum selection clause requiring disputes to be resolved in that jurisdiction. *See*

Pet. at 16 ("[n]either the Second or Fifth Circuit has considered the specific issue"). Petitioner asserts that "[a]t the district court level, conflicting decisions are already proliferating." Pet. at 7. But in fact the only district court to agree with petitioner's analysis did so in dicta. *See International Marine Underwriters CU v. M/V Kasif Kalkavan*, 989 F. Supp. 498 (S.D.N.Y. 1998) (enforcing a Korean forum selection clause in an *in personam* action, while suggesting that the clause would have been unenforceable in an *in rem* action). Furthermore, a subsequent decision in the same district rejected the argument that petitioner makes here and explicitly agreed with the decision below. *See Hyundai Corp. U.S.A. v. M/V An Long Jiang*, 1998 AMC 854, 856 (S.D.N.Y. 1998) (enforcing a Korean choice of forum clause).

The conflicts that petitioner claims at the appellate level are not conflicts at all, for the simple reason that petitioner has mischaracterized the decision below. The court of appeals did not permit a party to exempt itself from all liability. *Cf.* Pet. at 8, 12. DSR-Senator Lines and Cho Yang both do business in Korea, and there is no reason to think that a claimant would be unable to obtain jurisdiction over them in Korea. Thus cases such as *Knott v. Botany Mills*, 179 U.S. 69 (1900), and *The Kensington*, 183 U.S. 263 (1902), are irrelevant. They are not in conflict with the decision below.

The court of appeals did not invalidate any maritime liens. *Cf.* Pet. at 10, 14. Although petitioner has asserted a maritime lien under U.S. law, no court has yet determined who is in fact responsible for the cargo damage at issue here. If the appropriate court determines that the damage occurred while the cargo was in the custody of

the inland trucker in France, before it was delivered to the ocean carrier, for example, then neither Cho Yang nor DSR-Senator Lines will be responsible for the damage and even under U.S. law petitioner will have no lien. The court of appeals below simply enforced the parties' agreement that the appropriate court to determine these underlying questions would be Korean. Thus cases such as *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117 (1933), *The Keokuk*, 76 U.S. 517 (1869), *Dempsey & Associates v. S.S. Sea Star*, 461 F.2d 1009 (CA2 1972), and *Dods Shipping Ltd. v. Karobi Lumber Co.*, 397 F.2d 570 (CA5 1968), are also irrelevant. They, too, are not in conflict with the decision below.

Petitioner has gone far afield in search of a conflict. If it wishes to consider cases that do not directly address whether the unavailability of an *in rem* procedure defeats a bill of lading's forum selection clause, however, the most relevant authority is *Sky Reefer* itself. In that *in rem* action, this Court enforced a forum selection clause calling for arbitration in Tokyo – a forum in which the cargo claimant had no *in rem* rights.

B. ONLY ONE OTHER APPELLATE COURT HAS ADDRESSED THE PROPER SCOPE OF *SKY REEFER*

Not only is there no inter-circuit conflict on the issue presented here, there is not even any tension among the circuits on the proper scope of *Sky Reefer* in general. The Fifth Circuit is the only other court of appeals that has yet

addressed the scope of *Sky Reefer* in a published opinion.[1] In *Mitsui & Co. (USA) Inc. v. Mira M/V*, 111 F.3d 33 (CA5 1997) (per curiam), the court rejected various challenges to the application of *Sky Reefer* and enforced a forum selection clause calling for litigation in England. In *Steel Warehouse Co. v. Abalone Shipping Ltd.*, 141 F.3d 234 (CA5 1998), the Fifth Circuit, citing *Sky Reefer* and its own per curiam in *Mitsui*, enforced a London arbitration clause with two sentences of additional discussion.

Even if this Court were inclined to revisit the question of forum selection clauses in bills of lading, it would be premature to do so now. The lower courts should instead have an opportunity to apply this Court's *Sky Reefer* guidance in a range of situations. If the Court waits to grant plenary review until after the issues have percolated in the lower courts, it would then have the benefit of the experience and wisdom of the judges who face these issues on a more regular basis, and would accordingly be in a better position to formulate more workable rules (if it turns out that any additional rules are needed).

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[1] Other courts of appeals have cited *Sky Reefer* in other contexts as authority for the enforceability of forum selection clauses. *See, e.g., Itel Container Corp. v. M/V Titan Scan*, 139 F.3d 1450, 1454-55 (CA11 1998). None of these cases address the proper scope of *Sky Reefer*.

C. CONGRESS IS CURRENTLY CONSIDERING LEGISLATION THAT WOULD, WITH RESPECT TO FUTURE CASES, RESOLVE THE QUESTION PRESENTED

In *Sky Reefer*, this Court held that section 3(8) of COGSA does not prohibit the enforcement of forum selection clauses, but recognized that Congress could enact a statutory provision banning the enforcement of forum selection clauses – as the legislatures have done in some other countries, including Australia and South Africa. *See* 515 U.S. at 537.

While *Sky Reefer* was pending before this Court, the Maritime Law Association of the United States ("MLA"), which had been instrumental in obtaining the original enactment of COGSA, was coordinating a reexamination of the statute with a view to proposing a package of amendments for Congress's consideration. The principal segments of the industry were represented in the process, and ultimately agreed on a compromise proposal that is now pending before Congress. *See generally* Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 Hous. J. Int'l L. 609, 616-21 (1996) (describing the process); MLA doc. no. 724, at 2 (May 3, 1996) (resolution recommending the final proposal).

As part of this compromise, in which each side agreed to give up certain advantages in return for other benefits, section 3(8) would be amended to prohibit foreign forum selection clauses in bills of lading governing shipments to or from the United States. *See id.* at 51 (text of proposed amendment); Sturley, *supra*, 18 Hous. J. Int'l L. at 656-59 (explaining this aspect of the proposal).

It appears likely that Congress will enact the proposed amendments soon – perhaps even sooner than this Court could hear and decide the present case. In April, the Surface Transportation and Merchant Marine Subcommittee of the Senate Commerce Committee held hearings on the proposal. The president of the American Institute of Marine Underwriters ("AIMU"), petitioner's supporting *amicus*, was one witness who spoke in favor of the proposal, and he emphasized in particular the proposed amendment to section 3(8). At the end of the hearing, Senator Kay Bailey Hutchison, who chairs the subcommittee, declared, "I would like to pass a [COGSA] reform bill. . . . I think it really is necessary." Tim Sansbury, *Senator Vows Change to Liability Law Covering Cargo Damaged or Lost at Sea*, The Journal of Commerce, Apr. 23, 1998, at 1; *see also, e.g.*, Robert Mottley, *Revised COGSA on Senate Track*, American Shipper, June 1998, at 8-11.

There can be no guarantee, of course, that Congress will ultimately enact this legislation, although it now appears likely. At the very least, Congress is actively considering whether foreign forum selection clauses in bills of lading should be enforceable. This Court should accordingly postpone further consideration of the issue until Congress has had sufficient time to act on it. It would be highly inappropriate to take this statutory issue out of Congress's hands, and unfair to give petitioner and its supporting *amicus* one of their principal benefits under the compromise while ignoring the benefits that carriers such as respondents will receive under the proposed amendments.

II. THE COURT OF APPEALS CORRECTLY CONSTRUED SECTION 3(8) OF THE CARRIAGE OF GOODS BY SEA ACT AND PROPERLY APPLIED THIS COURT'S DECISION IN *SKY REEFER*

For over a quarter-century, starting with *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court has consistently recognized a general rule favoring the enforcement of forum selection clauses. *See also Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991). Thus it is widely accepted that forum selection clauses such as the one at issue here are enforceable in U.S. courts unless there is a specific ground for non-enforcement, such as fraud or overreaching. *See, e.g., Carnival*, 499 U.S. at 595; *Bremen*, 407 U.S. at 12. Three years ago, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), the Court recognized that this general rule applies in the bill of lading context and that section 3(8) of COGSA does not constitute a ground for non-enforcement. The court of appeals correctly applied these decisions to the specific facts before it.

A. THE *IN REM* PROCEDURE IS A PROCEDURAL REMEDY THAT IS OUTSIDE THE SCOPE OF SECTION 3(8)

Petitioner argues that its *in rem* claim against the ship is a valuable, substantive right, independent of its *in personam* claims against the carriers. *See, e.g.*, Pet. at 9-10. In making this argument, petitioner relies on the popular personification theory, *i.e.*, that "the ship, personified, is itself – or herself – the defendant in a proceeding *in rem* to enforce a lien." GRANT GILMORE & CHARLES L. BLACK, JR.,

THE LAW OF ADMIRALTY 589 (2d ed. 1975). This is, of course, a legal fiction, for the inanimate vessel itself can commit no wrong, and there is no liability under COGSA in the absence of fault, *see* COGSA § 4(2)(q), 46 U.S.C. app. § 1304(2)(q).

Petitioner would use this legal fiction to overrule *Sky Reefer*, but in fact the fiction lacks such power. Professors Gilmore & Black, following an extensive discussion in their leading treatise, summarize the situation as follows:

> It may be concluded that the fiction of ship's personality has never been much more than a literary theme. As such it reached a height of popularity toward the turn of the century. Since then even as literature it has fallen into disrepute, thanks in part to the influence of Holmes and Learned Hand. Fictions serve many useful purposes in the law. Initially their introduction is apt to be a sign of disturbance and growth. But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is always to be welcomed.
>
> . . . Since World War II the courts and commentators have been in comfortable agreement that the personification of the ship is and always has been merely a legal fiction, is not and never has been a principle of decision. Abandonment of the fiction would seem to have been a clear gain for legal thought.

GILMORE & BLACK, *supra*, at 616 (footnotes omitted).

Turning from fiction to reality, the *in rem* procedure is nothing more than a procedural device to enforce (in the context of this case) a cargo owner's claims against a

carrier. Just last Term, the Court implicitly recognized that an *in rem* action against a vessel in the possession of its admitted owner is in reality an action against the owner. *See California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464 (1998). Indeed, this Court recognized well over a century ago that the availability of an *in rem* remedy is only a procedural issue. *See The St. Lawrence*, 66 U.S. (1 Black) 522 (1861) (discussing an *in rem* rule in the 1844 Admiralty Rules). Congress recognizes the issue as procedural, as can be seen from its inclusion in the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. Supp. Rule C. Foreign courts, including the British House of Lords, recognize their own *in rem* rules as a procedural device for bringing an action against the owner of a vessel. *See, e.g., Republic of India v. India Steamship Co.* (No. 2), [1997] 3 W.L.R. 818, 822-29 (H.L.) (U.K.).

Korea may not follow the U.S. *in rem* procedures (because it does not recognize a maritime lien in this context), but other procedures are available under Korean law that enable a cargo owner to bring an action against an ocean carrier for alleged cargo damage. Indeed, petitioner concedes that "Korean law would be at least as favorable as COGSA to [petitioner] in asserting its claims against the carrier in Korea." Pet. at 4. Under section 3(8), the admitted procedural differences are simply irrelevant. *See Sky Reefer*, 515 U.S. at 534-35.

B. THE PETITIONER'S INTERPRETATION OF SECTION 3(8) WOULD EVISCERATE THIS COURT'S DECISION IN *SKY REEFER*

Petitioner claims that this case falls within an exception to the general rule recognized in *Sky Reefer*, *Carnival Cruise Lines*, and *The Bremen*. But if this Court were to recognize the unavailability of an *in rem* procedure and the corresponding nonrecognition of a maritime lien as justifying an exception, this new exception would swallow the general rule. As Professors Gilmore & Black note, "no two maritime countries have the same structure of lien law." GILMORE & BLACK, *supra*, at 788. Even the English theory of maritime liens and *in rem* procedures differs from our own. *See id.* at 589-90, 615-16. In fact, petitioner's *amicus* AIMU describes the action *in rem* as "[a] procedure unique to American admiralty practice." AIMU *Amicus* Brief at 5. Thus no foreign country that could ever be selected as a forum for resolving bill of lading disputes will ever apply exactly the same *in rem* procedures as a U.S. court. In other words, if petitioner were to prevail in this case, foreign forum selection clauses in bills of lading governed by COGSA would once again be unenforceable, the *Indussa* rule that this Court rejected would be resurrected, and *Sky Reefer* would be a dead letter.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 97-1999

In The

Supreme Court of the United States

October Term, 1997

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

vs.

M.V. DSR ATLANTIC, her engines, tackle, machinery, etc., in rem; CHO YANG SHIPPING COMPANY, LTD. a corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Respondents' opposition misses the point. The issue is whether a bill of lading clause that has the effect of relieving the *ship* of all liability can be enforced without violating § 1303(8) of COGSA. The "proposed legislation" discussed by respondents *retains in almost exactly the same language the principle at issue here*: Congress' mandate that a provision in a bill of lading relieving *a carrier or a ship* from liability is unenforceable. The proposed legislation does not in any way change cargo's substantive right to a maritime lien on the ship for damage to cargo. Moreover the "proposed legislation" is just that. While it would outlaw a foreign forum and jurisdiction clause such as the one involved in this case, no number has been assigned to any bill and already there is opposition to it. More importantly, the political events of September 1998, will certainly consume Congress' attention for the foreseeable future. Further, the facts that 1998 is an election year and that Congress has a history of years of delay in passing the first version of COGSA in 1936, render highly speculative predictions of prompt consideration of the proposed legislation anytime soon, much less its passage and signing by the President.

Respondents' opposition in fact reinforces the need for this Court's review of the Ninth Circuit's decision. Respondents and the Ninth Circuit propose a fundamental change in the law of maritime liens for cargo damage: A maritime lien is no longer a substantive right. It is "merely" a procedural device that can be lost by an artfully drawn bill of lading clause. Such a fundamental change calls for review by this Court, not only because it conflicts with the law of this Court, and of other circuit courts, but also because it has caused and will continue to cause confusion in the district courts.

PROPOSED LEGISLATION

The proposed legislation has not even been introduced to Congress. It is based on the proposed amendments to COGSA adopted by the MLA in 1996. Section 8(a) of the proposal is virtually identical to current COGSA § 1303(8) and retains the ship as a distinct legal entity:

> Any clause, covenant, or agreement in a contract of carriage relieving a carrier **or a ship** from liability for

> loss or damage to . . . goods . . . , or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect . . .

See MLA doc. no. 724 at 51. (Emphasis added).

The "final" version maintains the separate and distinct liability of carrier and ship:

> Any provision in a contract of carriage relieving a carrier **or a ship** from liability for loss of, or damage to, . . . goods . . . , or reducing such liability otherwise than as provided in the Act, is unenforceable as contrary to public policy.

See Sturley August 10, 1998 Memo Re: COGSA Bill — Working Draft of June 19, 1998 (App. A at 2a) (Emphasis added). While it is correct that the proposed legislation would completely outlaw a foreign forum and jurisdiction clause like the one enforced by the Ninth Circuit, cargo's right to a maritime lien against the ship remains unchanged. *See* MLA doc. no. 724 at 51, § 8(b).

As the Court well knows, the legislative process is inherently unpredictable. The proposed amendments have generated opposition. As noted in the same news article quoted by respondents, "The compromise plan, however, has a major detractor — the American Waterways Operators, representing the nation's inland and coastal barge and towing industry." Tim Sansbury, *Senator Vows to Change Liability Law Covering Cargo Damaged or Lost at Sea,* The Journal of Commerce, Apr. 23, 1998. In May, further opposition surfaced in an article headlined: *"Europe shipping interests blast proposed changes to US cargo liability rules."* Aviva Freudmann, The Journal of Commerce, May 4, 1998, at 1.

The political process is even more uncertain when it comes to legislation affecting international trade. The difficulty and history of delay inherent in the process of enacting such legislation are well-described by respondent's counsel in his 1996 article, Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 Hous. J. Int'l L. 609, 610-615 (1996):

> There are many possible explanations for this unfortunate situation, but all of them essentially reduce to one simple fact: Unless those affected by the rules in question can agree on the course of action that should be followed, Congress is unwilling to act in a complex and technical field where it has little expertise and sees no opportunity for political gain. This is hardly a new problem. Seventy years ago, the same kind of inertia was a principal explanation for Congress' failure to ratify the Hague rules promptly.

Id. at 613-614. If history is any guide, it could be years before Congress acts on the proposed legislation and likely far longer than it would take for the Court to hear and decide this case.

As acknowledged by counsel for respondents in his August memo to the MLA committee (App. A at 1a), the bill has not been introduced for "political reasons." Further changes are likely to be made to satisfy concerns of the railroads, American Waterways Operators or other interests. Finally, the MLA's Summer 1998 President's Newsletter dated August 15, 1998 states at page 4 regarding prospect for passage, "Given the exceptionally short session of the present Congress, it is expected that the Proposal will not be acted upon until after the new Congress convenes in 1999." As of September 1998, Congress has become engulfed with issues of far greater concern.

THE NINTH CIRCUIT'S DECISION EXTINGUISHING SUBSTANTIVE STATUTORY RIGHTS SHOULD BE REVIEWED

Even as the Court considers this petition, an additional district court has noted the conflict between the Ninth Circuit's decision and the plain language of § 1303(8) of COGSA. In *Union Steel America Co. v. M/V Sanko Spruce, et al.*, 1998 WL 416871, at 13 (D.N.J. July 20, 1998), __ F. Supp. 2d __, the district court addressed the scope of *Sky Reefer* with respect to requiring a cargo plaintiff with a maritime lien for cargo damage to litigate in Korea where all agree no *in rem* action against a vessel is recognized. It noted the conflict between the Ninth Circuit in this case and the district court in *International Marine Underwriters CU v. M/V Kasif Kalkavan*, 989 F. Supp. 498 (S.D.N.Y. 1998):

> Section 3(8) of COGSA forbids any clause in a contract of carriage relieving "the carrier or the ship from liability." One court has recognized that a "plaintiff's inability under Korean law to bring an *in rem* action against the vessel, would appear to deprive plaintiff of one of the substantive rights expressly guaranteed by § 3(8) (citing *Kasif Kalkavan*)." The Ninth Circuit has reached the opposite conclusion, reasoning that an *in rem* action is merely a means of enforcing COGSA liability (citing the *DSR Atlantic* decision).

These decisions cannot be harmonized. Undoubtedly, more conflicting and confusing rulings will follow as long as the Ninth Circuit's decision in *DSR Atlantic* stands.

This Court has consistently recognized *in rem* proceedings as the *only* way to enforce a maritime lien. In *California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464, 1470 (1998) the Court stated:

> That jurisdiction encompasses "maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien." (cit. om.).

Respondents and the *DSR Atlantic* decision would extinguish those substantive rights by confusing procedures for enforcing a substantive right with the right itself.

CONCLUSION

There is no legitimate reason for this Court to delay hearing this case because of proposed legislation which has not even been introduced to Congress. The proposed legislation does not change existing law maintaining the ship as a separate legal entity that is liable for loss or damage to cargo. While it would outlaw the forum clause enforced by the Ninth Circuit, it does not change the issue before this court: Whether or not a bill of lading clause can relieve the **ship** from liability for loss or damage to cargo. Finally, for the reasons discussed above, Congress is not likely to turn its attention to this kind of legislation in the near future. The reality is that it could be years before Congress acts on whatever legislation is finally put before it.

The Ninth Circuit and respondents confuse a substantive right to a maritime lien with the mechanism to enforce it. This confusion conflicts with clear statutory language and has led to conflict and more confusion in the district courts. It is axiomatic that a right with no remedy is no right at all. A right does not become a "mere procedure" because procedures are in place to protect and enforce it. By their nature, rights are abstract concepts — "legal fictions" — that require legal procedures for protection and enforcement. Reducing that right to a "mere procedure" that can be avoided by a bill of lading clause extinguishes it. Such a fundamental change in maritime lien law should emanate from Congress and certainly calls for review by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — STURLEY AUGUST 10 MEMO

TO: Lloyd Ator

CC: William J. Augello
Karyn Booth
George F. Chandler
Vincent M. DeOrchis
Chester D. Hooper
Marilyn L. Lytle
Howard M. McCormack
James F. Moseley

FROM: Michael F. Sturley

DATE: August 10, 1998

RE: COGSA Bill — Working Draft of June 19, 1998

Although I understand that the COGSA Bill is not yet ready to be introduced (for political reasons), the draft itself is virtually ready — at least in terms of giving effect to the substance of the original MLA proposal. My comments at this point involve primarily typographical errors and stylistic suggestions.

I understand that some additional changes will need to be made that will change the substance of the original MLA proposal. For example, I understand that there is agreed language to be added that will satisfy the railroads' concerns. Perhaps there will also be language added for the benefit of the American Waterways Operators (AWO) or other interests. I do not address any of those concerns here.

* * * * *

EXCERPT FROM COGSA '98 6/19/98 REVISION

[Commencing at page 15]

(B) the carrier was not entitled to qualify the statement under paragraph (1); or

(C) a person relying on the statement proves that the carrier did not act in good faith when issuing the contract of carriage.

(h) RELIEF-FROM-LIABILITY CLAUSES. —

(1) IN GENERAL. — Any provision in a contract of carriage relieving a carrier or ship from liability for loss of, for damage to, or in connection with goods from negligence, fault, or failure in the duties and obligations under this Act, or reducing such liability otherwise than as provided in this Act, is unenforceable as contrary to public policy.

(2) INSURANCE. — A benefit-of-insurance clause in favor of a carrier, or similar clause, shall be considered, for purposes of paragraph (1), to be a provision relieving a carrier from liability.

(i) FOREIGN FORUM PROVISION. —

(1) APPLICATION. — This subsection applies to a contract of carriage or other agreement that was entered into before a claim that is subject to this Act arose under that contract or agreement.

(2) IN GENERAL. — A provision in a contract of carriage or other agreement to which this subsection applies that specifies a foreign forum for litigation . . .

* * *